No. 93-796

In the Supreme Court of the United States

OCTOBER TERM, 1993

BLAINE A'MMON WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

NINA GOODMAN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the jury at petitioner's first trial, which acquitted him on one count and was unable to reach a verdict on another count, decided an issue of fact in his favor that would preclude reprosecution on the count on which the jury was unable to reach a verdict.

2. Whether petitioner's retrial violated the Double Jeopardy Clause because the charges on which he was convicted in the second trial involved the same conduct as the charge on which he was acquitted in the first trial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A27) is reported at 1 F.3d 13. A prior opinion of the court of appeals (Pet. App. B2-B23) is reported at 936 F.2d 1326. The opinion of the district court (Pet. App. C2-C31) is reported at 757 F. Supp. 45.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1993. A petition for rehearing was denied on October 1, 1993. Pet. App. D2, E2. The petition for a writ of certiorari was filed on November 19, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of making false statements in a passport application and of aiding and abetting the commission of that offense, in violation of 18 U.S.C. 1542. He was sentenced to 12 months' imprisonment. The court of appeals affirmed. Pet. App. A2-A27.

1. In 1989, petitioner, who is an attorney, represented a client who wanted to obtain a United States passport. On November 1, 1989, petitioner obtained from the Maryland vital records office a certified copy of a birth certificate bearing the name William S. Baldwin. Petitioner's client later applied for a passport in the name of William Baldwin, submitting the birth certificate as proof of his identity. On November 13, petitioner signed an affidavit in support of the passport application, in which he identified the applicant as William Baldwin and stated that he had known the applicant for five years and that he knew the applicant was an American citizen. Pet. App. A3-A4; Pet. App. B6-B8.

2. A federal grand jury returned a two-count indictment charging petitioner with possessing an identification document with the intent that it be used to defraud the United States, in violation of 18 U.S.C. 1028(a)(4), and making false statements in a passport application, in violation of 18 U.S.C. 1542. Pet. App. A4-A5.

At trial, the government introduced evidence that petitioner had been involved in a scheme to obtain false identification documents for Harold Linden, a Canadian citizen who was residing in the United States illegally, and that in connection with the

scheme he had provided Linden with a false birth certificate and with a Social Security number belonging to another client of petitioner's law firm. The evidence showed that the real William S. Baldwin had died on October 30, 1989, and that his obituary had appeared in the newspaper the day before petitioner applied for the birth certificate. An official from the vital records office testified that petitioner had obtained the birth certificate under a special procedure that the office used to allow attorneys to obtain records of deceased persons. Pet. App. A5-A6; Pet. App. B7.

In his defense, petitioner testified that the man identified at trial as Harold Linden had always been known to him as William Baldwin and that he was unaware that there was any special procedure for obtaining deceased persons' records. Petitioner claimed that he had no idea he was acquiring a dead person's birth certificate, and he asserted that the affidavit he signed in support of his client's passport application was true to the best of his knowledge. Pet. App. A6.

The jury acquitted petitioner on the document fraud count, but it was unable to reach a verdict on the count charging petitioner with making false statements in a passport application. The district court declared a mistrial on the "hung" count and dismissed the charge without prejudice. Pet. App. A6-A7.

3. Thereafter, the grand jury returned a second indictment. That indictment charged petitioner with making false statements in a passport application, the charge on which the jury had failed to reach a verdict. In addition, it charged petitioner with conspiring to

commit offenses against the United States, in violation of 18 U.S.C. 371; shielding an illegal alien from detection, in violation of 8 U.S.C. 1324(a)(1)(C); and aiding and abetting the making of false statements in a passport application, in violation of 18 U.S.C. 1542. Pet. App. A7; Pet. App. B9-B10.

Petitioner moved to dismiss the charges on collateral estoppel and double jeopardy grounds. First, he argued that by acquitting him on the document fraud count, the jury in the first trial conclusively determined that he did not know that Harold Linden was not William Baldwin, and that any subsequent prosecution that called into question that jury determination was barred by the collateral estoppel component of the Double Jeopardy Clause. Second, petitioner contended that the government was barred from prosecuting him on the charges in the second indictment because those charges involved the same conduct as the charge on which he was acquitted. Finally, petitioner argued that even if the government could proceed with the second prosecution, his acquittal on the document fraud count precluded the government from introducing evidence of his conduct in obtaining the birth certificate. Pet. App. C12-C30.

The district court denied the motion. Pet. App. C2-C31. The court rejected petitioner's claim that his acquittal on the document fraud count meant that the jury had necessarily determined that he did not know Linden's true identity. The court explained that "the jury "could have found that [petitioner] possessed the birth certificate on November 1, 1989, but did not have the intent to defraud the United States at that time," or "could have found that [petitioner] had the requisite intent on November 13, 1989, but did not

possess the birth certificate on that date." Pet. App. C18-C19. The court concluded that because "issues * * * other than the issue of knowledge of Mr. Linden's identity * * * could have accounted for [petitioner's] acquittal" on the document fraud count, petitioner had failed to show that his acquittal precluded the government from relitigating that issue. Pet. App. C19.

The district court also rejected petitioner's "same conduct" claim, stating that "the instant indictment does not charge [petitioner] with the same conduct [with] which he was charged in [the first indictment]." Pet. App. C21-C22. With respect to petitioner's claim that the government was barred from reintroducing evidence of his conduct in obtaining the birth certificate, the court noted that "[t]he government concedes that it will be precluded from arguing to the jury that [petitioner] possessed the birth certificate on November 1 and 13, 1989 with the intent to defraud the United States Government." Pet. App. C26. The court stated, however, that "since the government has established that [petitioner's] acquittal on [the document fraud count] could have been based on several factors," evidence introduced in the first trial that "did not have a direct bearing" on either count of the first indictment could be reintroduced in the second trial. Pet. App. C26-C27.

4. Petitioner took an interlocutory appeal from the district court's order, and the court of appeals affirmed. Pet. App. B2-B23. The court of appeals rejected petitioner's claim that his acquittal on the document fraud count meant that the jury had necessarily determined that he believed his client was William Baldwin. The court observed that had the

jury found, as petitioner contended, that he "actually believed Linden to be William Baldwin," it "could have found that [petitioner] did not wilfully make a false statement in the passport application" and would have acquitted him on the passport fraud count as well. Pet. App. B15-B16. Thus, the court stated, accepting petitioner's argument would require it "to assume that the jury acted inconsistently, reaching opposite findings on the same issue in the different counts." Pet. App. B17. Because it was "loath to impute such inconsistency to the jury," the court held that petitioner had not established that the issue of his knowledge of Linden's true identity was in fact determined in the first trial. *Ibid.* Accordingly, the court concluded that the doctrine of collateral estoppel did not bar the government from relitigating that issue under the second indictment. *Ibid.*

Petitioner also renewed his claim, citing *Grady* v. *Corbin*, 495 U.S. 508 (1990), that the Double Jeopardy Clause barred the government from retrying him because, in order to prove the offenses charged in the second indictment, it would be required to prove conduct for which he had been prosecuted under the first indictment. The court of appeals concluded that it "need not reach this argument," observing that the government had conceded that it "may not reprove the conduct involving the birth certificate offense unsuccessfully prosecuted under the first indictment." Pet. App. B21.

5. At petitioner's second trial, the jury convicted petitioner of making false statements in a passport application and of aiding and abetting that crime. The jury acquitted petitioner on the other counts. Pet. App. A10.

6. In the court of appeals, petitioner again argued that under *Grady* v. *Corbin*, *supra*, his retrial violated the Double Jeopardy Clause because the government had prosecuted him for the same offense of which he had been acquitted in the first trial. The court of appeals rejected petitioner's reliance on *Grady*, noting that that decision had been overruled and that "the Supreme Court has made clear that the * * * *Blockburger* test is the sole test for determining whether the crimes charged in successive prosecutions are the 'same offense' for double jeopardy purposes." Pet. App. A11 (citing *United States* v. *Dixon*, 113 S. Ct. 2849 (1993)). The court explained that "[t]he *Blockburger* analysis focuses strictly on the statutory elements of crimes: two offenses are not the same as long as each requires proof of an element the other does not." Pet. App. A11 (citing *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)).

Applying that analysis, the court had "little doubt that document fraud under 18 U.S.C. § 1028(a)(4) is not the same offense as either passport fraud or aiding and abetting passport fraud under 18 U.S.C. §§ 1542 & 2." Pet. App. A11-A12. The court reasoned that "[d]ocument fraud under section 1028 requires possession of an identification document, while passport fraud under section 1542 requires proof that the accused made a false statement in a passport application." Pet. App. A12-A13. Thus, the court stated, the elements of the two offenses "could hardly be more distinct." Pet. App. A13. Moreover, in order to convict petitioner of aiding and abetting passport fraud, the government "must prove the same elements of passport fraud—which, as we have already noted, are different from those for the offense of [document

fraud] described in section 1028—and then must prove aiding and abetting." Pet. App. A13-A14. The court concluded that "sans *Grady*, which directed Double Jeopardy analysis to the government's reproof of the same conduct, [petitioner] is left without support for his Double Jeopardy claim." Pet. App. A14-A15.

Petitioner asked the court of appeals to reconsider its ruling that the doctrine of collateral estoppel did not bar the government from relitigating the issue of his knowledge of Linden's true identity. The court, however, declined to revisit that question, stating that "[w]e have already held * * * that the jury in the first trial did not conclusively determine that [petitioner] did not know Linden's true identity. * * * That holding is the law of the case, and there is no reason for us to disturb it." Pet. App. A15 n.1.

ARGUMENT

1. Petitioner renews his claim (Pet. 16-23) that the doctrine of collateral estoppel barred his retrial for making false statements in a passport application following his acquittal of document fraud. Petitioner contends that the first jury must have determined that he believed that Linden was actually William Baldwin, and that the government was foreclosed from relitigating that issue in the second trial. The court of appeals correctly concluded that the collateral estoppel doctrine did not bar petitioner's retrial.

a. In our view, the doctrine of collateral estoppel should never bar the government from retrying a defendant on a count as to which a jury was unable to reach a verdict, when the same jury has acquitted the defendant on one or more other counts. This Court's cases establish that "a retrial following a 'hung jury' does not violate the Double Jeopardy Clause."

Richardson v. *United States*, 468 U.S. 317, 324 (1984). As this Court has noted in a slightly different context, "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984).

The rationale underlying the collateral estoppel doctrine does not justify precluding a retrial where a jury has failed to reach a verdict on one or more counts of a multi-count indictment while acquitting the defendant on other counts. Under the doctrine of collateral estoppel, an acquittal on one charge bars the government from proceeding on another charge only if the jury in acquitting the defendant decided some fact in his favor that the government had to prove beyond a reasonable doubt in order to convict on the second charge. See *Ashe* v. *Swenson*, 397 U.S. 436, 443-445 (1970); see also *Dowling* v. *United States*, 493 U.S. 342, 347-348 (1990). Where the jury has acquitted a defendant on some charges while failing to reach a verdict on others, there are two explanations for the mixed verdict.

First, it is possible that the jury acquitted the defendant by finding that the government failed to prove some fact that would not be necessary for conviction on the count on which the jury failed to reach a verdict. If so, the collateral estoppel doctrine simply has no application, and reprosecution on the "hung" count is permissible. See *Dowling* v. *United States*, 493 U.S. at 347-348.

Second, it is possible that the jury acquitted the defendant by finding that the government failed to prove some fact that was necessary for conviction on

the count on which the jury failed to reach a verdict. In that case, however, the jury's failure to acquit the defendant on the second charge would be inconsistent with its acquittal on the first. This Court has held that "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" when the jury's verdict itself is inconsistent. *United States* v. *Powell*, 469 U.S. 57, 68 (1984). See also *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980) (inconsistency in jury verdicts "is reason, in itself, for not giving preclusive effect to the acquittals"). Accordingly, the hypothesis that the jury acted inconsistently would also fail to make out a collateral estoppel claim.

Under either explanation, the defendant cannot make the necessary showing that the jury found in his favor on a fact necessary to conviction on the count on which the jury was unable to reach a verdict. Accordingly, retrial on the "hung" count is always permissible in that situation.

b. While not rejecting the above analysis, the court of appeals followed a somewhat different route to the conclusion that collateral estoppel is not applicable here. In addressing the collateral estoppel claim, the court of appeals properly examined "the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter." *Ashe* v. *Swenson*, 397 U.S. at 444. The court found that it was of particular relevance that the count that petitioner seeks to preclude was itself at issue in the prior prosecution, but that the jury was unable to reach a verdict on it. As the court explained, "[h]ad the jury found, as [petitioner]

contends, that he actually believed Linden to be William Baldwin, it would have acquitted him on the [passport fraud] count as well as the [document fraud count]." Pet. App. B15-B16. Since the court was "loath to impute such inconsistency to the jury," Pet. App. B17, it held that the jury "must have based the [document fraud] acquittal on a finding other than that which [petitioner] urges." Pet. App. B16.[1]

The court's reasoning is similar to that employed by the First Circuit in *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir.), cert. denied, 113 S. Ct. 105 (1992). In that case, the defendant was acquitted in her first trial of importation of cocaine, but the jury was unable to reach a verdict on the charge that she possessed cocaine with intent to

[1] Although the court of appeals did not find it necessary to specify further precisely what finding the jury reached in acquitting petitioner on the document fraud count, the district court did offer an explanation of how the first jury could have acquitted petitioner on the document fraud count without deciding in his favor any issue of fact necessary to conviction on the passport fraud count. The district court noted that the jury could have found that petitioner did not have the requisite intent to defraud the United States at the time he obtained the birth certificate or while he had it in his possession. Pet. App. C18-C19. The jury might have concluded that, during that period, petitioner intended to use the birth certificate to defraud some other entity or for some other purpose. Petitioner argues (Pet. 17, 19-20) that that was unlikely, because the closing arguments focused the jury's attention not on that issue, but on an issue that the government had to prove in order to convict petitioner on either count: whether petitioner knew that Linden was not the individual named in the birth certificate. The jury, however, was not limited to reaching a verdict solely on the basis of the issues addressed by counsel in closing arguments.

distribute it. The court of appeals rejected her contention that the jury had found that she did not know that cocaine was in certain packages that she picked up at a post office—a finding that would have required an acquittal on both counts. Citing the court of appeals' decision in this case and this Court's decision in *Powell*, the First Circuit held that it "cannot find that a rational jury could have been so inconsistent as to find 'no knowledge' as to one count, and 'knowledge' as to the other." 957 F.2d at 24. In addition, the court found that there was an explanation for the mixed verdict that would have made the jury's conduct with respect to the two counts entirely consistent: the jury could have found that petitioner did not cause the importation of the cocaine, but then deadlocked as to whether petitioner intended to distribute it. *Id.* at 25.

Three courts of appeals have approached the issue differently. In *United States* v. *Seley*, 957 F.2d 717, 722-723 (9th Cir. 1992), the court held that an acquittal on one count of a multi-count indictment barred reprosecution on another count, on which the jury had failed to reach a verdict. The court held that the jury's failure to acquit on the "hung" count—notwithstanding its finding of an essential fact in the defendant's favor—did not create "the logically inconsistent mixed verdict of acquittals and convictions to which *Powell* applies." *Id.* at 723.

Similarly, in *United States* v. *Frazier*, 880 F.2d 878, 885-886 (1989), cert. denied, 493 U.S. 1083 (1990), the Sixth Circuit applied the collateral estoppel doctrine to bar retrial on a "hung" count based on a simultaneous acquittal on another count. The court rejected the argument that a jury's simultaneous

acquittal and failure to reach a verdict could amount to the kind of inconsistency that would trigger the *Powell* rule that no factual finding in the defendant's favor can be deduced from inconsistent verdicts. 880 F.2d at 882-883.

Finally, *United States* v. *Bailin*, 977 F.2d 270, 276-280 (7th Cir. 1992), applied a similar rule in a slightly different context. In *Bailin*, the jury was unable to reach a verdict on a RICO charge, but acquitted the defendant on counts charging some—but not all—of the RICO predicate acts. The court of appeals held that the government could not charge the counts on which the defendant had been acquitted as predicate acts when it reprosecuted the RICO count. In reaching that conclusion, the court refused to apply the *Powell* rule, holding that "the jury's failure to reach a verdict is too inconclusive to qualify as inconsistent [with the acquittal] for the purposes of issue preclusion." *Id.* at 280 (internal quotation marks and brackets omitted). See also *Ferrell* v. *State*, 567 A.2d 937, 944-945 (Md.), cert. denied, 497 U.S. 1038 (1990).

There is considerable tension between the decisions in *Seley*, *Frazier*, and *Bailin*, which refused to treat mixed verdicts of the sort at issue here as "inconsistent" for purposes of the *Powell* rule, and the decisions in this case and *Aguilar-Aranceta*, which expressly referred to such verdicts as "inconsistent." But it cannot be said that there is at this time a conflict. Although the courts in this case and *Aguilar-Aranceta* both relied on this Court's decision in *Powell*, neither court expressly held that it would apply the *Powell* rule if it had found the mixed verdict to be inconsistent; both courts merely

held that the need to avoid imputing such inconsistency to the jury was (at least) an important factor suggesting that the jury's acquittal had to be rationally explicable on some other basis.[2] Similarly, the courts in *Seley*, *Frazier*, and *Bailin* did not hold that the jury's failure to reach a verdict was necessarily entirely irrelevant in determining what facts the jury found in acquitting the defendant on other counts; those courts merely found that, on the particular facts of those cases, the defendants had made out their collateral estoppel claims.

In sum, no court of appeals has held that a mixed verdict like the one in this case cannot collaterally estop retrial on the "hung" count, and no court of appeals has held that the fact that the jury failed to reach a verdict on the hung count is of no relevance in determining whether the defendant has made out a collateral estoppel claim. Accordingly, it is not at

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[2] As noted above, see note 1, *supra*, the court of appeals in this case did not find it necessary to offer any explanation of the jury's acquittal on the document fraud count that would render it consistent with the jury's failure to reach a verdict on the passport fraud count. That suggests that the court may have believed that the need to avoid imputing any inconsistency to the jury was sufficiently great to establish, as a matter of law, that the jury did not find any fact in petitioner's favor that would preclude reprosecution on the "hung" count. If so, the court's position is equivalent to our position that collateral estoppel may never be applied to convert an acquittal on one count into an acquittal on another count on which the jury failed to reach a verdict. But the court of appeals' opinion stated that it was "loath" to impute an inconsistency to the jury (Pet. App. B17), not that it would refuse to do so, and the court did not expressly state that, if it did find such an inconsistency, it would refuse to apply the collateral estoppel doctrine to bar a retrial.

present clear whether the differences between the D.C. and First Circuits, on the one hand, and the Sixth, Seventh, and Ninth Circuits, on the other, are mere differences in emphasis and terminology or represent a more fundamental conflict concerning the proper treatment, under *Powell*, of a mixed verdict like the one in this case. Since it cannot be concluded at present that there is a conflict in the circuits, further review is unwarranted.

2. The question presented in the petition relates only to the application of the collateral estoppel doctrine in cases in which a jury returns a verdict of acquittal on one count of a multi-count indictment and fails to reach a verdict on another count. See Pet. i. Petitioner nonetheless contends in the portion of the petition entitled "Argument" that further review is warranted to determine, apart from the collateral estoppel doctrine, "what protection, if any, is afforded a criminal defendant with respect to having to relitigate prior acquitted conduct." Pet. 26. In particular, petitioner contends (Pet. 24-29) that his second trial violated the Double Jeopardy Clause because the passport fraud offenses on which he was convicted involved the same conduct as the document fraud count on which he was acquitted. In the court of appeals, petitioner based that argument on this Court's decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990).

Petitioner's claim is foreclosed by this Court's decision in *United States* v. *Dixon*, 113 S. Ct. 2849 (1993), in which the Court overruled *Grady*, see 113 S. Ct. at 2859-2864, and held that the sole test for determining whether two offenses are separate offenses for double jeopardy purposes is that set forth in *Block-*

burger v. *United States*, 284 U.S. 299, 304 (1932)—*i.e.*, "whether each offense contains an element not contained in the other."[3] 113 S. Ct. at 2856. Petitioner does not challenge the court of appeals' ruling (Pet. App. A11-A14) that document fraud and passport fraud are separate offenses under the *Blockburger* test. Accordingly, further review to reconsider this Court's holding in *Dixon* is unwarranted.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

NINA GOODMAN
Attorney

FEBRUARY 1994

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[3] Petitioner attempts to distinguish *Dixon* (Pet. 25) by pointing out that it involved a "contempt proceeding" rather than "substantive offenses." The Court observed in *Dixon*, however, that "criminal contempt, at least the sort enforced through nonsummary proceedings, is 'a crime in the ordinary sense,'" and it held that the Double Jeopardy Clause applied in nonsummary criminal contempt prosecutions just as in other criminal prosecutions. 113 S. Ct. at 2856 (quoting *Bloom* v. *Illinois*, 391 U.S. 194, 201 (1968)).

[4] Petitioner's claim that the law remains unsettled after *Dixon* rests primarily on Justice Souter's dissent in that case. See Pet. 24-26. The Court in *Dixon*, however, specifically addressed and rejected the reasoning of the dissenting opinion. See 113 S. Ct. at 2860-2863.